FILED
SEP 3 1999
OFFICE OF THE CLERK

No. 99-58

In The

Supreme Court of the United States

JACK HAWKINS, Individually and as President of the DENVER AREA LABOR FEDERATION; and PETE VRIESENGA, Individually and as President of the DENVER MUSICIANS ASSOCIATION,

Petitioners,

vs.

CITY AND COUNTY OF DENVER; GARY LANE, Director of the DENVER THEATERS AND ARENAS; BROOK NICHOLS, Assistant Building Manager of the DENVER THEATERS AND ARENAS; and DAVID MICHAUD, as CHIEF OF THE DENVER POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DANIEL E. MUSE
City Attorney
STAN M. SHAROFF
Counsel of Record
Assistant City Attorney
1445 Cleveland Place, Room 302
Denver, Colorado 80202
Telephone: (303) 640-2302
Facsimile: (303) 640-5609
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. The Denver Performing Arts Complex 1

B. The Galleria 2

C. Denver's Policy 3

D. The Petitioners' Grievance 4

REASONS FOR DENYING THE WRIT 5

CONCLUSION 10

APPENDIX ..... Resp. App. 1

TABLE OF AUTHORITIES

Page

CASES

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) 7, 8

Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S 37 (1983) 5, 7, 9, 10

Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) 6, 8

United States v. Kokinda, 497 U.W. 720 (1990) 7

STATEMENT OF THE CASE

The Petitioners accurately describe the nature of this dispute concerning Denver's policy prohibiting leafleting in a corridor of the Denver Performing Arts Complex (DPAC). The Petitioners claim that the Galleria, a partially enclosed space that serves as a lobby and common entryway into and out of all of the DPAC's venues and its parking garage, should be available for leafleting and other speech activities so that they can communicate their displeasure with the Colorado Ballet to theater patrons. Denver, on the other hand, contends that it has consistently viewed the Galleria as a "nonpublic forum" and has reasonably prohibited – regardless of content – all picketing, demonstrating, leafleting and other speech activities in this area.

A. The Denver Performing Arts Complex

The DPAC is several blocks long and wide and consists of several theaters and a concert hall. **Petitioners' Appendix A,** p.22a. As is apparent from the diagrams attached to the Tenth Circuit's opinion, *see id.* at pp.22a-23a, the DPAC property site is occupied, for the most part, by the large performing spaces and the parking structure and very little space is dedicated to sidewalks or passageways to enter the performing theaters or the parking structure. *Id.* In fact, the exclusive means of gaining entry into and out of all of the DPAC venues is through the Galleria.

The complex's three largest facilities are the Auditorium Theater, Temple Buell Theater and Boettcher Concert Hall. *Id.* The seating capacity of the DPAC

performing spaces is approximately 9,300 and it is common for the several theaters to have simultaneous performances, thus bringing actual attendance close to the facility's seating capacity. The facility has a limited parking capacity of only about 1,600 spaces. *Id.*, p.3A. The parking shortage therefore requires patrons to find off-site parking at nearby parking lots and these patrons are required to enter the performing venues from the 14th Street entrance which has a long and wide public sidewalk allowing entry into the Galleria and the DPAC. As previously noted, all theater patrons enter and exit through the Galleria, regardless of whether they park in the DPAC parking garage or off-site.

B. The Galleria

The Galleria is a partially enclosed corridor and, contrary to the Petitioners' view, does not at all resemble a closed-off street. **Petitioners' Brief,** p.12. In size, its dimensions measure 40 feet across at its widest point, 32 feet at its narrowest point, and has an overall length of 600 feet. It is covered with glass, making it an ideal location for patrons to gather free from inclement weather. The Tenth Circuit noted that during a performance's intermission, theater patrons gather in the Galleria for a breath of fresh air, to socialize and converse, to smoke and to stretch their legs.

The Galleria becomes an extended lobby for the overflow of patrons which the interior lobbies of the three main performance venues cannot accommodate. During these intermissions, the Galleria becomes an extremely congested place, the space becoming completely occupied

by theatergoers who have virtually no room to freely move about. The photographs appended hereto in Respondents' Appendix, pp.1-2, accurately depict the congestion in the Galleria during performance intermissions. Indeed, when there are simultaneous performances in several of the performing areas, there is insufficient room in the Galleria for all those wishing to go to this lobby. The Tenth Circuit accurately described the Galleria as an extension of the lobby spaces of the various theaters rather than as a distinctly separate area of the complex. **Petitioners' Appendix A,** p.3A. It most certainly was not viewed by the court of appeals as merely a street closed to vehicular traffic, the view the Petitioners urge upon the Court. **Petitioners' Brief,** p.12. The Tenth Circuit also recognized that the Galleria serves the DPAC as the exclusive fire exit to unload, on a busy night, the approximately 9,000 theater patrons should there be a need for an emergency evacuation. **Petitioners' Appendix A,** p.3A. As is apparent from one of the Petitioners' photographs, there is an information kiosk centrally positioned in the Galleria which informs patrons of coming attractions. **Petitioners' Appendix D,** p.61a.

C. Denver's Policy

Denver's policy prohibits all expressive activities in the Galleria such as demonstrations, speeches, picketing and leafleting. It also prohibits the posting of handbills, notices, flyers and other written messages. The only exceptions to this policy are the material in the information kiosk which is published by the City and is limited to information about upcoming events at City-owned facilities and the signs of the three businesses located on the

premises of the DPAC. The retail establishments' signs, rather than advertising or promoting their goods, merely announce the presence of the business adjacent to the sign.

Denver's policy of prohibiting speech activities is consistently enforced regardless of the message or the identity of the putative speaker. The Tenth Circuit, in its examination of the record, found that "Denver officials have enforced this policy as an absolute ban on leafleting and picketing in the Galleria." **Petitioners' Appendix A,** p.11A.

D. The Petitioners' Grievance

The Petitioners complain that they were denied access to the "most appropriate" place for their protest – the Galleria. **Petitioners' Brief,** p.10. However, a review of the Tenth Circuit's opinion reveals that sidewalks surround the DPAC and that these sidewalks were available to the Petitioners for their protest activities. Indeed, the Tenth Circuit found that "[u]p to 40 or 50 percent of DPAC patrons enter the DPAC via these sidewalks." **Petitioners' Appendix A,** p.21A. However, the Petitioners rejected protesting on the sidewalks even though this site would have given them access to thousands of DPAC patrons. The court of appeals held that these sidewalks provided the Petitioners an adequate alternative means to reach "a large portion of the DPAC patrons." **Petitioners' Appendix A,** p.21A.

REASONS FOR DENYING THE WRIT

The Court's free speech jurisprudence suggests that the threshold inquiry is an examination into the nature of the public property the Petitioners sought to use for their expressive activities. The Court has identified three distinct categories of government property: (a) traditional public fora; (b) designated public fora; and (c) nonpublic fora. *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

1. The Tenth Circuit, applying the public forum analysis, held that the Galleria was not a traditional public forum, it not being a park or analogous to a public right-of-way or thoroughfare. The Petitioners argue that the Galleria, prior to the construction of the DPAC, was a public street and remains so notwithstanding its altered physical state. **Petitioners' Brief**, p.12. This assertion is fallacious. The diagrams attached to the court of appeals opinion clearly demonstrate that the Galleria, prior to the construction of the DPAC, was a paved thoroughfare known as Curtis Street. **Petitioners' Appendix A**, p.22a. However, with the construction of the DPAC, Curtis Street between 13th and 14th Streets was vacated as a public thoroughfare and renovated into a lobby/entranceway for the performing venues of the DPAC. Photographs of the Galleria clearly show that the area is no longer a public street suitable for vehicular traffic. It now contains steps and ramps of differing heights leading to the parking structure and, immediately to the south, is a public park known as Sculpture Park. **Respondents' Appendix**, p.3. The Galleria also contains a huge sculpture in its center. *Id.* In addition, the Galleria contains oversized flowerpots and an information kiosk

which contains literature on upcoming events at City-owned facilities. **Respondents' Appendix,** p.4. Thus, the Petitioners' characterization of the Galleria as a "public street" with "a glass roof over the block," *see* **Petitioners' Brief** at pp.12-13, is simply not true. The Galleria is clearly no longer a street.

The Petitioners note that the Galleria is not gated and is open to the public as a pedestrian walkway. (It serves as the entryway into Sculpture Park which Denver regards as a traditional public forum.) The Court has regarded open public access as, in and of itself, insufficient to create a public forum:

> Although most airports do not ordinarily restrict public access, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." *United States v. Grace,* 461 U.S. 171, 177 (1983).

Society for Krishna Consciousness v. Lee, 505 U.S. 672, 686 (1992) (O'Connor, J., concurring).

The Petitioners, striving to characterize the Galleria as a public forum, argue that if the decision is not reversed, Denver will be free to install a glass roof over its financial district or shopping districts and convert these public fora into nonpublic fora. **Petitioners' Brief,** p.13. In the Respondents' view, this argument is a desperate attempt to build a case for *certiorari* review out of nothing more than speculation. The Petitioners certainly have not pointed to any evidence showing that Denver built the Galleria as a subterfuge to deny speakers a public forum.

The Court has identified a number of factors which should be reviewed in determining whether public property enjoys public forum status, such as the location of the forum, its purpose, as well as its nature. For example, in *United States v. Kokinda*, 497 U.S. 720 (1990), the Court considered whether an interior sidewalk providing access into and out of a post office was a public forum. The Court stated that: "[t]he location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.* at 497 U.S. 728-29. After analyzing the nature of the sidewalk, the Court held that the post office sidewalk, unlike most sidewalks, was not a public forum because:

> The postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry*.

Id. at 497 U.S. 727.

Similarly, the Galleria was constructed solely to provide entry and exit from the performing venues of the DPAC and to serve as a lobby prior to performances and during intermissions. It was not created "to facilitate the daily commerce and life of the neighborhood or city." *Id.* at 497 U.S. 728, and cannot fairly be said to be a traditional public forum. It is property which does not count as "a principal purpose . . . the free exchange of ideas." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Put another way, the Galleria is not a place which has historically been dedicated to free expression or for the purpose of communication between citizens.

2. The Petitioners next argue that even if the Galleria is not a traditional public forum, it is a designated public forum because "[n]o forum other than the Galleria adequately offers this opportunity [to leaflet]." **Petitioners' Brief,** p.13. This argument misses the point. A designated public forum is not created because it serves a putative speaker's need or is an ideal location for expressive activities. Rather, a designated public forum is created by the government "[o]nly by intentionally opening a nontraditional forum for public discourse." *Cornelius, supra,* 473 U.S. at 802. Denver has not opened the Galleria for expressive activities but has made it unequivocally clear to all that speech activities are not permitted. Public property, to be considered a designated public forum, must be "expressly opened . . . to the types of expression at issue. . . . " *Society for Krishna Consciousness, supra,* 505 U.S. at 686 (1992) (O'Connor, J., concurring).

Furthermore, the record evidence demonstrates that the Petitioners' assertion that the Galleria is the only available public area to communicate its ideas to DPAC patrons is factually not true. The trial court and Tenth Circuit found, based upon uncontradicted evidence, that approximately 40%-50% of the DPAC patrons could be approached by the Petitioners if they positioned themselves along the 14th Street sidewalk, a traditional public forum.

3. The Petitioners state that, if the Galleria is not a public forum, either traditional or designated, their speech activities are still permissible because Denver's absolute prohibition of leafleting is not reasonable or justifiable for this particular nonpublic forum. This position ignores several unassailable facts produced at trial.

First, the Galleria serves as a lobby for the various performing venues of the DPAC and is thus not designed nor intended for expressive activity. As the Tenth Circuit found, the Galleria:

> also acts as a place for theater patrons to congregate before performances and during intermissions, in effect serving as an extended lobby for the various performing arts venues. During these periods, and when patrons are arriving or departing from DPAC events, the Galleria can become extremely congested, particularly when multiple events are scheduled.

Petitioners' Appendix A, p.3A.

The photographs of the Galleria show just how crowded the Galleria is before performances and during intermissions. **Respondents' Appendix,** pp.1-2. As previously noted, there is insufficient space for theater patrons in the Galleria, let alone the Petitioners. The government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speakers' view." *Perry Educational Ass'n v. Perry Local Educators' Ass'n, supra,* 460 U.S. at 47. The Galleria is designed and intended to serve as the entryway and lobby of the DPAC. These purposes are compromised or made more difficult by the Petitioners' leafleting.

Second, the Galleria is the only evacuation route for the performing arts venues in the event of an emergency, such as a fire. **Petitioners' Appendix A,** p.3A. Denver's efforts to minimize obstructions or impediments to evacuation by prohibiting demonstrators or picketers is a

reasonable regulation. Advancing the fire safety of approximately 9,000 theater patrons by attempting to keep the only fire exit free and clear from those not attending DPAC events is certainly a reasonable objective. Stated somewhat differently, prohibiting the Petitioners' (and all others') leafleting is "consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.' " *Perry, supra,* 460 U.S. at 50-51 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129-30 (1981)).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted this 3rd day of September, 1999.

DANIEL E. MUSE
City Attorney
STAN M. SHAROFF
Assistant City Attorney

Attorneys for Respondents
1445 Cleveland Place, Room 302
Denver, Colorado 80202
Telephone: (303) 640-2302
Facsimile: (303) 640-5609

No. 99-58

In The

Supreme Court of the United States

JACK HAWKINS, Individually and as President of the DENVER AREA LABOR FEDERATION; and PETE VRIESENGA, Individually and as President of the DENVER MUSICIANS ASSOCIATION,

Petitioners,

vs.

CITY AND COUNTY OF DENVER; GARY LANE, Director of the DENVER THEATERS AND ARENAS; BROOK NICHOLS, Assistant Building Manager of the DENVER THEATERS AND ARENAS; and DAVID MICHAUD, as CHIEF OF THE DENVER POLICE DEPARTMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' APPENDIX

RESPONDENTS' APPENDIX
TABLE OF CONTENTS

Page(s)

Trial Exhibit D (photograph of Galleria during an intermission from the auditorium matinee) ..... Resp. App. 1

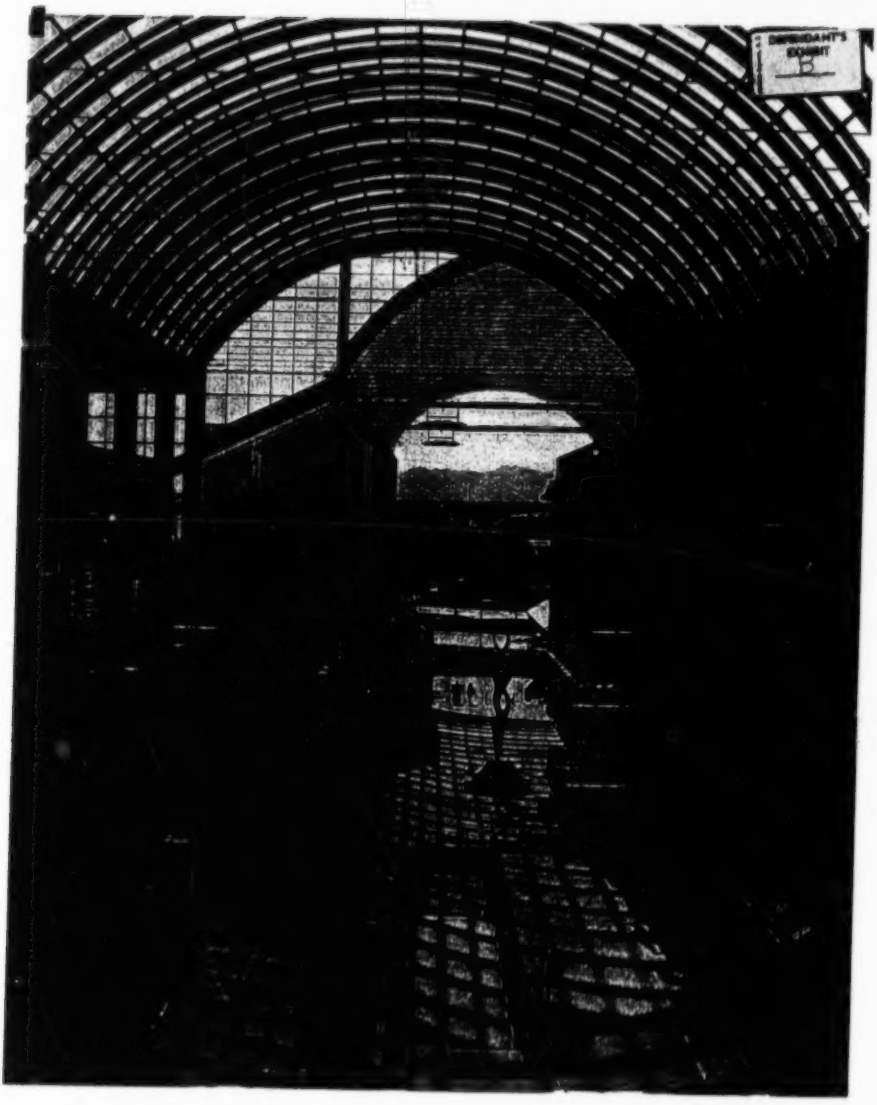
Trial Exhibit F (close-up photograph of Galleria crowd) ..... Resp. App. 2

Trial Exhibit B (photograph of Galleria from upper level in parking garage, looking out toward Speer Boulevard) ..... Resp. App. 3

Trial Exhibit C (photograph of Galleria from 14th Street entrance, looking toward Speer Boulevard) ..... Resp. App. 4

DEFENDANT'S
EXHIBIT
D

Resp. App. 2


DEFENDANT'S
EXHIBIT
B

Resp. App. 4